GUNUNG BAYU SDN. BHD.

v.

SYARIKAT PEMBINAAN PERLIS SDN. BHD.

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NOS. 16 & 32 OF 1985]
27 FEBRUARY 1987

CIVIL PROCEDURE: *Appellants entered into a building contract with respondents for construction of a housing scheme - Provision for periodic payments based on interim certificates to be issued by appellants' architects - Appellants refused to honour certificates - Respondents terminated contract and filed a writ - Injunction applied for and granted - Application for O. 14 judgement against appellants - Appellants' application for stay dismissed - Appeal - Whether any triable issues - Whether appeal should be allowed.*

The appellants entered into a building contract with the respondents, a firm of building contracts for the construction of a housing scheme. The contract contained the usual provisions for periodic or progress payments based on interim certificates to be issued by the appellants' architects, Messrs. Hijjas Kasturi Associates Sdn. There was also the usual arbitration clause.

Work proceeded and in due course 5 interim certificates were issued on the work done duly signed by the architects. interim certificates No. 1, 2 and 3 were signed by one Mr. Gabriel Wong who was said to be a qualified architect (but a non-registered architect). The appellants refused to honour these certificates. the respondents terminated the contract and filed a writ and also applied for and were granted an injunction against the appellants to restrain them from bringing other contractors onto the site.

The appellants then applied to have the writ struck off on the ground that the parties had agreed under the agreement to arbitration in the event of "any dispute or difference". The application was later dismissed. The respondents then applied for an O. 14 judgement on the sums due on the interim certificates and the appellants countered with an application for a stay of the hearing of the respondents' O. 14 application. These 2 applications were heard together by the learned Judge and the application for stay was dismissed while the respondents were allowed to enter summary judgement under O. 14.

The appellants then appealed against both the abovementioned decisions. The appellants contended *inter alia* that as Wong was not a registered architect under the Architects Act 1967, therefore it was not permissible for him to sign on behalf of the firm and that the respondents cannot say that the appellants are estopped from denying the validity of Wong's certificates.

Held:

[1] There appears to be a plentitude of triable issues and since it is trite law that leave to defend must be given unless it is clear that there is no substantial question to be tried or unless there is no dispute as to facts or law which raises a reasonable doubt that the plaintiff is entitled to judgement, the appeal was allowed.

[2] The action be stayed since by consent the parties will now submit their dispute to arbitration.

[3] The sum of RM505,700 shall be refunded to the appellants with interest.

[Appeal allowed with costs.]

Cases referred to:
Mottram Consultants Ltd. v. Bernard Sunley & Sons Ltd. [1975] 2 Lloyd's LR 197
Codd v. Delap [1905] 92 LT 510

Legislation referred to:
Architects Act 1967, ss. 2, 7(1), (1)(a), (2), 10(2), (2)(a)(ii), (2)(a)(iii), (2)(b)

Other sources referred to:
Hudson's Building & Engineering Contracts, 10th Edn., p. 92
Edmen's Building Contracts & Practice, p. 84

For the appellants - Peter Mooney (Van Buerle with him); M/s. Chong Wai Meng & Van Buerle
For the respondents - Mahinder Singh Dulku; M/s. Mahinder Singh Dulku & Co.

JUDGMENT

Wan Suleiman SCJ:

The appellants Gunung Bayu Sdn. Bhd. were the defendants in the Court below (in High Court Alor Star Civil Suit No. 461 of 1984). They had entered into a building contract with the respondents/plaintiffs (Syarikat Pembinaan Perlis Sdn. Bhd.), a firm of building Contractors, for the construction of a housing scheme called Taman Tunku Putra in Kulim, Kedah.

The architects named in the contract are Hijjas Kasturi Associates Sdn. who are specifically described therein as the appellants' architect. There was the usual provisions for periodic or progress payments based on interim certificates to be issued by the appellants' architects, and the time for honouring these certificates were also specified in the appendix to the agreement (one month and fourteen days respectively).

There was also the usual arbitration clause. Work proceeded apace and in due course 5 interim certificates were issued on the work done, duly signed by the architects. appellants refused to honour these certificates. Respondents terminated the contract and filed a writ, and also applied for and was granted an injunction against appellants to restrain them from bringing other contractors onto the site, it being respondents' contention that they had substantially completed the project.

Appellants then applied by way of summons-in-chambers to have the writ struck out on the ground that under the agreement (Clause 34) parties had agreed to go to arbitration in the event of "any dispute or difference". The application was heard and dismissed on 6 January 1985.

Next the respondents applied by summons-in-chambers for an O. 14 judgment on the sums due on the interim certificates. Appellants countered with a summons-in-chambers for a stay of the hearing of respondents' application for an O. 14 judgment, pending the outcome of appellants' appeal to this Court against the dismissal of their application to strike out respondents' writ.

These two applications were hears together by the learned Judge, and on 22 February 1985 appellant's application for stay was dismissed whilst respondents were allowed to enter summary judgment under O. 14.

This appeal is therefore against both the abovementioned decisions, and with the consent of Counsel for the various parties were heard together.

Dato Peter Mooney for the appellants confined this appeal to two issues only *viz:*

(i) Is this a proper case for summary judgment; and
(ii) If not, should it be dealt with by the High Court or should it go to arbitration?

Certain preliminary questions would, it was argued, have to be determined before an answer can be given for the main issues earlier referred to.

Paragraph 4 of the statement of claim alleged that one of the terms of respondents' employment by the appellants/defendants was that the appellant should honour the interim certificates issued by his own architects within 14 days of presentation or alternatively within a reasonable time of such presentation.

Arising out of this, one of the questions is - Is such interim certificate issued by an unqualified architect **a valid** certificate?; and secondly assuming such certificate is valid, is it to be regarded as a sort of cheque, regardless of whether work is well done, badly done or not done at all.

The agreement (at p. 16 of Civil Appeal No. 16/85) specifies that the term "the architect" in the conditions annexed shall mean M/s. Hijjas Kasturi Associates Sdn. etc.

Clause 30(1) reads as follows: "At the period of Interim Certificate named in the appendix to these conditions the Architect shall issue a certificate stating the amount due to the contractor from the employer, and the Contractor shall, on presenting any such certificate to the employer, is entitled to payment therefor within the period for honouring Certificates named in the appendix to these conditions. Interim valuations shall be made whenever the Architect considers them to be necessary for the purpose of ascertaining the amount to be stated as due in an Interim Certificate."

Dato' Mooney emphasised that in Clause 30(2), an interim certificate shall be the total value of the work **properly** executed.

Clause 30(7) sets out the circumstances when a final certificate shall be **conclusive** evidence that work had been properly carried out and, Clause 30(8) states that except as set out in (7) no certificate of the architect shall be conclusive evidence of such.

Referring lastly to the Clause 34(1) and (3), it was argued that quite clearly the parties had relegated all disputes to arbitration.

The appellants are relying on Interim Certificates No. 1, 2 and 3 (on pp. 21, 24 and 27 of Civil Appeal No. 32/85) which were signed by Mr. Gabriel Wong who was said to be a qualified architect (but a non-registered architect).

The respondents' managing director, Mr. Chew had (at p. 51(ii) and p. 53 in C.A. No. 32/85) stated in his affidavit that these Interim Certificates had never been validly questioned prior to the filing of the civil suit and so that there can be no valid dispute such as to bring cl. 34 of the agreement into operation. Further at p. 55 (in same volume) he had added that wild and unsubstantiated allegations had been made against respondents/plaintiffs in respect of the quality of the work it had performed. Dato' Peter Mooney's comment was that such allegations had been sub-stantiated by high authority i.e. the consultants referred to on pp. 64/65.

In short the appellants' case is contained in pp. 59/60 of affidavit of their director Chan Fook Sing and can be summed up as follows:

(1) Certificates 1, 2 and 3 were signed by Gabriel Wong who is not a registered architect under Architects Act 1967, and even though certificate 5 was signed by Azman, the accompanying valuation, a part of its supporting document, was signed by the former.

(2) Terms of the contract specifically required an architect from Messrs. Hijjas Kasturi Associates Sdn. who would be a partner to sign such certificates, and permit no delegation.

Out attention was also drawn to the fact that no attempt had been made to reply to appellants' affidavit.

Regarding the allegation in Chew's affidavit of 21 January 1985 that appellants' allegation against tht certificates are mere after-thoughts as evidenced by the letter dated 30 September 1984 asking respondents/plaintiffs to confirm that a sum of RM400,400 was due from appellants to them (p. 104). Appellants' explanation was that it was inadvertently signed having been included among standard letters prepared by his auditors without reference to the appellants as to their correctness.

To support his contention that the signature of Mr. Wong made the three interim certificates invalid, we were referred to the Architects Act 1967.

Section 2 of the Act defines an "architect" as a person registered under s. 10(2). Dato Peter Mooney's contention is that Mr. Wong is not an "architect" within the meaning given to that term in this Act and in the agreement entered into between the parties, being merely an architectural graduate not having the experience required under s. 10(2)(a)(ii) and 10(2)(b) to be registered under section A so that though he may be employed as an architect (small "a") by virtue of s. 7(2), he cannot be a partner because of s. 7(1). It was emphasized that s. 7(1)(a) says that no person unless he is an architect-

> (a) practise or carry on business or take up employment as an architect under any name, style or title bearing the word "Architect" or the equivalent thereto in any other language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is an Architect.

We were also referred to p. 92 of the 10th Edn. of *Hudson's Building & Engineering Contracts* which goes as follows:

> In building contracts, while the use of qualified architectural assistants, who are permanent employees of the architect's firm is widespread in larger contracts, it is unusual to find their status in any way regulated by the contract documents, and they normally function merely as agents of the architect, tough without any power *vis-a-vis* the contract to discharge or carry out his many quasi-judicial duties under the contract." and at pp. 149, 150 of the same book, the learned author said:
>
> > Thus in the task of supervision the architect or engineer, though he may be assisted by professional assistants or clerks of works or both, cannot escape responsibility, except perhaps in the smallest matters of detail, by delegation (unless the contract of employment so provides). He may make use of assistants, provided he retains control of the work and does not cease to exercise his own supervision and judgment...

All this, submitted learned Counsel, go to support his thesis regarding the importance of the interim certificates being signed by the "architect" referred to in the agreement and not by a mere "graduate architect".

This contention appears to be further buttressed by another passage on pp. 484, 485 of the same work, under the heading "who is to give the certificate":

> A certificate, in the absence of any provision or implication to the contrary, can only be given by the person or persons designated in the contract(whether by name or description)...
>
> In many building contracts the certifier is named in the contract as an individual. If a firm is named, it is submitted that a certificate issued by a partner for and on behalf of the firm will satisfy the contractual requirement.

Another passage referred to is in the 8th Edn. of *Emden's Building Contracts & Practice at* p. 84 which states that "the certifying architect or engineer may make use of the work of others in collecting the information necessary to enable him to certify, but nevertheless the certificate is his and his alone."

Appellants' contention is thus threefold *viz:*

(1) Wong is not a registered architect;
(2) It is not permissible for him to sign on behalf of the firm; and
(3) Respondent cannot say that appellant is estopped from denying the validity of Wong's certificates.

As regards the grounds of judgment of the learned trial Judge, Counsel has the following comments to make:

(a) The learned Judge was mistaken when he noted (at p. 2 of the grounds of judgment) that the respondents had successfully applied for an injunction restraining the appellants from bringing in other contractors to replace them. Referring next to respondents' contention accepted by the Judge that apppellants had RM297,151.77 in retention money etc. in their custody, a sum adequate to cover any over-valuation by the architect, he countered that such sum was to cover defects subsequently found and was never meant to cover overpayment on interim certificates. Finally learned Counsel referred to that portion of the judgment which indicated that the learned trial Judge had been under the misapprehension that appellants had sacked their architects whereas in fact it was Wong whose services had been terminated. Hijjas Kasturi Associates, the architects named in the Agreement, we have been assured, are still the appellant's architects.

Mr. Dulku for respondents of course insists that certificates 1, 2 and 3 are valid.

The contractor-respondent had gone into possession of the site about April 1984. About 6 months later on 20 December 1984, appellants had written to the board of architects a letter (C.A. no. 32 of 1985 p. 69) inquiring whether Wong was a registered architect, and was informed by the board (p. 70) that he was a registered architectural graduate.

A firm registered under s. 10(2) of the Architects Act 1967 would include, he argues a registered architectural graduate with practical experience, an argument which overlooks the requirement of s. 10(2)(a)(iii) which has the additional requirement that he "is a Corporate member of the Pertubuhan Akitek-Akitek Malaysia" or has obtained a qualification which the Board considers equivalent thereto.

Alternatively Mr. Dulku relies on s. 7(2) which states that:

> Notwithstanding subsection (1), a registered Architectural Graduate may with the written approval of the Board take up employment as an Architect.

This provision enables Wong, he contends, to perform the function of an architect, there being nothing to indicate that no permission had been so obtained. Besides, s. 7A enables a corporation, with the permission of the board, such as Hijjas Kasturi Associates Sdn. to be named as architect. All the interim certificates he emphasised had been issued by the

latter and not by any natural person and taking the certificate No. 1 (p. 21 in C.A. no 32/85) as an example, which bore the Hijjas Kasturi Associates Sdn. letterhead, were therefore in proper form and valid.

Mr. Dulku gave as his reason for not going to arbitration in the first place the House of Lords' decision in *Mottram Consultants Ltd v. Bernard Sunley & Sons Ltd.* - [1975] 2 Lloyd's LR 197. Learned Counsel appears to regard *Mottram's* case as a proposition for the rule that though overvaluation should be referred to arbitration, the amount set out in the certificate should however first be paid.

It appears to us that far from being a general proposition of law, *Mottram's* case was decided on its peculiar set of facts and is not applicable here.

We do not feel that it would serve any useful purpose to examine each and every one of the numerous points which Mr. Dulku raised to support his contention that the O. 14 judgment should remain. The substance of his argument is that the interim certificates are valid, there is no suggestion that Mr. Wong is not qualified to act and certify under s. 7(2) of the Architects Act 1967, and that the defence to respondents' application for an O. 14 judgment are mere allegations and afterthought.

What is clear to us is that there appears to be a plentitude of triable issues. It is trite law that leave to defend must be given unless it is clear that ther is not real substantial question to be tried (*Codd v. Delap* [1905] 92 LT 510) or unless there is no dispute as to facts or law which raises a reasonable doubt that plaintiff is entitled to judgment.

The appeal was therefore allowed with costs here and in the Court below. We also ordered that the action be stayed, since by consent the parties will now submit their dispute to arbitration. The sum of RM505,700 shall be refunded to appellants with interest from 5 April 1985 at 8% per annum to date of payment thereof.

We also order refund of the deposit to appellants.

Also found at [1987] 2 CLJ 9